BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2018-318-E and 2018-319-E

IN RE:	Application of Duke Energy Progress, LLC for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order; and Application of Duke Energy Carolinas, LLC for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order	**MOTION TO ESTABLISH A NEW AND SEPARATE HEARING DOCKET TO REVIEW AND CONSIDER THE COMPANIES' GRID IMPROVEMENT PLAN**

The South Carolina Office of Regulatory Staff ("ORS") moves the Public Service Commission of South Carolina ("Commission") to establish a new and separate docket to review and consider the requests of Duke Energy Progress, LLC ("DEP") and Duke Energy Carolinas, LLC ("DEC") (collectively, "Companies") for approval of the Companies' Grid Improvement Plan ("GIP"). (*See* Docket No. 2018-318-E, Application of DEP for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order at ¶¶ 11, 34–41; Docket No. 2018-319-E, Application of DEC for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order at ¶¶ 12, 35–42.)

The GIP requests Commission pre-approval of approximately $455 million capital outlay through a 3-year grid investment program. Through the GIP, the Companies ask the Commission to pre-approve certain future grid improvement costs and to implement phased-in rate increases outside of a general rate proceeding. Approval of the GIP in these proceeding would unconstitutionally deprive utility customers of procedural due process by limiting their right to timely challenge the prudency of any future phases of the GIP and by failing to provide an opportunity for meaningful review of the GIP within the context of these expansive and complex

dockets. ORS respectfully requests that the Commission decline to consider the GIP within these existing dockets. The Commission should remedy the lack of due process and shortage of time to comprehensively examine the GIP proposal by requiring the Companies to file a request to establish a separate docket to examine the GIP.

Procedural due process under the South Carolina constitution guarantees an "opportunity to be heard 'at a meaningful time and in a meaningful manner'" before a person may be deprived of a property interest. *Tall Tower, Inc. v. S.C. Procurement Rvw. Panel*, 294 S.C. 225, 232, 363 S.E. 2d 683, 686–87 (1987); *see also* S.C. Const. Art. I § 22; *S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010) ("the protections provided under [S.C. Const. Art. I § 22] are the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions.") Where a property interest may be affected by government action, procedural due process requires "such procedural protections as the particular situation demands" based on "the importance of the interest involved and the circumstances under which the deprivation may occur." *See State v. Binnarr*, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012) (internal quotations and citations omitted).

Customers have a property interest in their rates and in the right to participate in the ratemaking process under state law. *See Hamilton v. Bd. of Trustees of Oconee Cty. Sch. Dist.*, 282 S.C. 519, 525, 319 S.E.2d 717, 721 (Ct. App. 1984) (a property interest is "a legitimate claim of entitlement" under, *e.g.*, state law); S.C. Code §§ 58-27-830 ("Utility shall not charge rates different from those in schedule"), -870(A) (requiring "a public hearing concerning the lawfulness or reasonableness of the proposed [rate] changes"). In its review of the constitutionality of the South Carolina Base Load Review Act, the South Carolina Attorney General has also opined that "ratepayer monies constitute 'property' for . . . procedural due process purposes." 2017 WL

4464415, at *20 (S.C.A.G. Sept. 26, 2017) (citation omitted); *see also S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010) (due process protections under S.C. Const. Art. I § 22 equivalent to state and federal constitutional Due Process Clauses).

The inclusion of the Company's proposed GIP in these ratemaking docket violates customers' due process because 1) the Company's proposed mechanism for pre-approval, as prudent, of future costs and the recovery thereof denies customers a meaningful review of those future costs; and 2) the limited statutory time prescribed under which this rate proceeding must occur denies all interested parties the ability to meaningfully and sufficiently review the Company's proposed GIP and the costs sought to be passed on to customers.

First, by seeking guaranteed, up-front recovery of multiple future grid investments (and corresponding rate increases), the Company's proposal denies interested parties the ability to meaningfully participate in the review process preceding the rate increases proposed to be phased-in by the GIP. Under the Company's Application, no mechanism exists for "exam[aning] [] the appropriateness of the [GIP]" after initial approval. (*See* Direct Testimony of Kim Smith, p. 41 l. 20.) The Company's proposed pre-approval recovery mechanism forecloses a customer's opportunity to timely challenge the prudency of any aspect of the GIP after initial approval, and restricts the ability of the Commission, ORS, and the ratepaying public to meaningfully examine the prudency of specific GIP costs, "regardless of changes in circumstances." 2017 WL 4464415, at *25 (S.C.A.G. Sept. 26, 2017). South Carolina experimented with such a cost recovery methodology under the Base Load Review Act, which the General Assembly rejected through

repeal, *see* 2018 Act 258, and which the Attorney General determined to be constitutionally suspect, *see* 2017 WL 4464415, at *1 (S.C.A.G. Sept. 26, 2017).[1]

Second, the restricted statutory time constraints of a rate case do not allow an adequate opportunity for comprehensive and meaningful review of the GIP. *See State v. Binnarr*, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012) (procedural due process requires "such procedural protections as the particular situation demands" (internal quotation omitted)). Under S.C. Code § 58-27-870(B), when an electrical utility files a schedule to change its rates or tariff, the Commission "must rule and issue its order approving or disapproving the changes within six months[.]"

The comprehensive GIP proposals submitted to the Commission demonstrate that there will be an inadequate opportunity for customers to be heard under the circumstances. *See*, *e.g.*, *Grannis v. Ogden*, 234 U.S. 385, 394 (1914) (due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner" (internal punctuation and alterations omitted)); *accord Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970). As is clear from the Applications and from the extensive testimony and exhibits filed with the Commission outlining the GIP, grid modernization is expensive, intensive, and complicated. Between the two dockets, 8 witnesses discuss GIP exclusively, and 18 address it at some length. The Companies' overview of the GIP alone is 65 pages. (Oliver Ex. 9.) Thirty-four pages are devoted entirely or almost entirely to listing, line by line, the individual projects that comprise the proposed GIP. (Oliver Ex. 9.) The amount of information *behind* the Companies' conclusions and proposals in the GIP is staggering[2]; that fundamental information is almost entirely absent from the Companies' testimony and would be

[1] Attached here as Exhibit 1.

[2] Many of these data omissions are summarized in the GridLab whitepaper *Modernizing the Grid in the Public Interest: Getting a Smarter grid at Least Cost for South Carolina Customers*, see especially pp. 20–24. Available for download at: https://gridlab.org/publications; attached here as Exhibit 2.

nearly impossible to adequately address within the existing shortened time constraints of the current proceedings. *See also* PSC Directive, Docket No. 2017-370-E, 2018 WL 741904, at *1 (Jan. 31, 2018) ("the opportunity for thorough discovery consistent with due process and as sought by the parties should be allowed"). Combined, the Duke dockets have attracted substantial testimony from some 19 intervenor-sponsored witnesses. DEP has put forward 16 witnesses, DEC 19.

The Companies' proposal also merits additional scrutiny because it represents a significant departure from traditional ratesetting principles. While ORS does not dispute that regulatory innovation is appropriate when circumstances require, the departures from traditional ratesetting principles requested by the Companies through the GIP have not yet been properly vetted, and there just simply is not sufficient time to do so as part of the pending rate cases. Accordingly, there is a heightened "risk of erroneous deprivation" of customer rights, and a corresponding impact "in the specific dictates of due process." *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Other state commissions have concluded that specific, dedicated public review of grid modernization proposals is necessary. The Public Utilities Commission of Ohio recently devoted 100 hours to education as part of its PowerForward grid modernization investigation.[3]

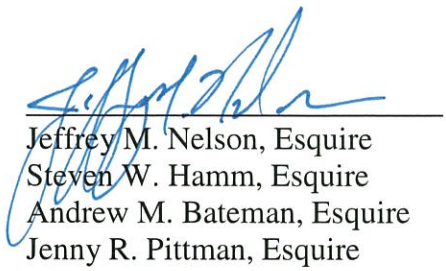
Notably, when DEC sought to secure approval of a similar plan through its most recent North Carolina rate case, the North Carolina Utilities Commission directed DEC to "utilize existing proceedings, such as the Integrated Resource Planning and Smart Grid Technology Plan docket, to inform the Commission on and collaborate with stakeholders regarding grid modernization initiatives and the potential cost recovery mechanisms for such initiatives." NCUC

[3] *See* Ohio PowerForward: A Roadmap to Ohio's Electricity Future, Ohio Public Utilities Commission, attached here as Ex. 3; *see also 50 States of Grid Modernization: Q42 018 Quarterly Report & 2018 Annual Review* at p.65, attached here as Ex. 4.

Docket E-7 Sub 1146, Order p. 19 #44.[4] ORS also respectfully submits that because DEC and DEP operate systems in both North and South Carolina, the long-term impacts of the GIP are significant, and the commissions and staffs have limited resources, S.C. Code Ann. § 58-27-170 may be helpful. ORS has had one meeting with the North Carolina Public Staff on this matter. Coordination will likely result in efficiencies for everyone including the utilities.

For these reasons, ORS respectfully submits that constitutionally adequate review of the GIP is not possible within the confines of the pending rate cases. Approval of the GIP would violate procedural due process, but even if consideration of the GIP does not rise to a violation of procedural due process, the portions of the Companies' Applications dealing with approval of the GIP should be filed in a separate Commission docket given the complexity and enormous costs that must be examined in detail. (*See* DEP App. at ¶¶ 11, 34–41; DEC App. at ¶¶ 12, 35–42.) A transfer to a new docket should be without prejudice to the Companies' rights to pursue the GIP outside the context of a future general rate case or to incur grid improvement costs and seek a prudence review and recovery in a rate case. To facilitate the transition to a new docket, the Commission should further direct the parties to confer on a timeline and process for that docket, and to submit a proposal to the Commission indicating areas of agreement and disagreement, if any, within the next 90 days.

[4] Available at: https://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=80a5a760-f3e8-4c9a-a7a6-282d791f3f23



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